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Supreme Court of the United States,

OCTOBER TERM, 1906.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs

THE ABILENE COTTON COMPANY,
Defendant in Error.

In Error to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

BRIEF FOR DEFENDANT IN ERROR.

HANNIS TAYLOR,
Counsel for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1906.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

v.

THE ABILENE COTTON OIL COMPANY,
Defendant in Error.

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BRIEF FOR DEFENDANT IN ERROR.

I.

HIGHEST COURT OF A STATE MAY ADMINISTER THE COMMON LAW ACCORDING TO ITS OWN UNDERSTANDING AND INTERPRETATION.

It is firmly settled here that the highest court of a State may administer the common law according to its own understanding and interpretation without liability to a review in the Federal Supreme Court, unless some right, title, immunity or privilege, *the creation of the Federal power*, has been asserted and denied. Pennsylvania R. R. Co. *v.* Hughes, 191 U. S. 477. In that case this Court said: "But this is not a question of Federal law wherein the decision of the highest Federal tribunal is of conclusive

authority. * * * The cases are numerous and conflicting, different rules prevailing in different states. The Federal courts in cases of which they have jurisdiction will doubtless continue to follow the rule of the Hart case, but the highest court of Pennsylvania may administer the common law according to its understanding and interpretation of it, being only amenable to review in the Federal Supreme Court where some right, title, immunity or privilege, the creation of the Federal power, has been asserted and denied. Bethell *v.* Demaret, 10 Wall. 537; Delmas *v.* Merchants' Mut. Ins. Co., 14 Wall. 666; New York L. Ins. Co. *v.* Hendren, 92 U. S. 287; United States *v.* Thompson, 93 U. S. 586." Where no right, title, immunity or privilege, the creation of the Federal power, is involved, the highest court of the State of Texas has final jurisdiction, without review here, to determine that under the common law as administered in that State, a railroad company is subject, as a common carrier, to the common law liability for unreasonable, unjust and discriminative freight charges. From the opinion of the highest court of Texas (Tr. p. 38) we learn: "In this state it is declared by express legislative enactment that the common law of England (so far as it is not inconsistent with the constitution and laws of this State), shall, together with such constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the Legislature. R. S. Art. 3,558." Under that common law, which it has an exclusive right to administer "according to its understanding and interpretation," the Court of Civil Appeals adjudged in this case, "that the

appellee (The Texas and Pacific Railway Co.), in demanding and receiving the excessive freight rate as found by the Court, violated a common law right of the appellant in this case." (Tr. p. 39.) A jury being waived in the primary court, a finding of facts was there made by the judge, who determined "That said charge was unreasonable, unjust and extortionate." In the Court of Civil Appeals this conclusion was reached: "It must follow that upon the facts the judgment should have been for appellant. We therefore adopt the trial court's finding of fact, and, applying thereto the principles of law we have adduced, reverse the judgment and here render judgment in appellant's favor for the said sum of $1,951.83, excessive freight charges, together with interest thereon."

II.

HAD THAT COMMON LAW RIGHT, AS THUS ADMINISTERED, BEEN TAKEN AWAY BY THE INTERSTATE COMMERCE ACT, APPROVED FEBRUARY 4, 1887?

Counsel for plaintiff-in-error make here a single contention, and that is, that the common law right, which the highest court of the State of Texas has attempted to administer, had been taken away by the Interstate Commerce Act of 1887, "by necessary implication." There is no pretence that it was so taken away in express terms. The language of the Brief is this: "3c. The Interstate Commerce Act providing that remedies thereunder must be sought in the Federal courts or before the Interstate Commerce Commission, but not in both, *by necessary implication excludes the idea of jurisdiction in any other tri-*

bunals," p. 13. On p. 12 the matter is thus stated: "A party who seeks damages alleged to have been sustained in consequence of a violation by a common carrier of the Interstate Commerce Law, as the act provides for redress by a procedure either before the Commission or by suit in a Federal court, can not bring suit before a State court, which is without jurisdiction to enforce the right, but is relegated exclusively to the Commission or Federal Court; otherwise, the party would have a third alternative or mode of redress not contemplated by the Act. He is restricted to one or two remedies." Passing over the Irish bull involved in "a third alternative," it must be said here that the fundamental fault in the above statement is the assumption that the defendant in error is seeking damages "in consequence of a violation by a common carrier of the Interstate Commerce Law." Defendant-in-error makes no such claim. Its claim is for damages suffered in consequence of a violation by a common carrier of its common law right to be exempt from unreasonable, unjust, and discriminative freight charges. The single question is whether that common law right, as administered by the highest court of the State of Texas, has been taken away by reason of the fact that the Interstate Commerce Act has conferred upon the shipper cumulative remedies. The single issue is therefore one of statutory construction.

The following principles have been recognized by this Court from its foundation. "(4) *Statutes in Derogation of Common Law.* (a) In General.—It is a well established rule of construction that statutes in derogation of the

common law are to be strictly construed, and hence, while a statute which is plainly inconsistent with the common law will prevail, yet statutes are not presumed to make any alteration in the common law further or otherwise than the clear import of the statutory language necessarily requires." Am. and Eng. Enc. of Law, Vol. 26, p. 662, and authorities cited, including Brown *v.* Barry, 3 Dall. 365; Wilson *v.* Lenox, 1 Cranch, 211; McCool *v.* Smith, 1 Black, 459; Shaw *v.* R. Co., 101 U. S. 557.

Affirmative words without negative words do not annul the common law. Unless the intent of a statute is manifest, irresistable, the constructive repeal of the common law, *by implication*, can not be inferred. Jennings *v.* Com., 17 Pick. 82; State *v.* Norton, 23 N. J. L. 39.

New remedy cumulative. "When an affirmative statute introductory of a new law directs a thing to be done in a certain manner, that thing shall not, even in the absence of negative words, be done in any other manner; *but when the statute merely provides a new remedy for a pre-existing right*, and contains no negative express or implied of the old remedy, the new remedy is merely cumulative. * * A statute instituting a new remedy for an existing right does not take away a pre-existing remedy without express words or necessary implication; the new remedy is cumulative and either may be pursued." Am. and Eng. Enc. of Law, Vol. 26, pp. 614, 671, and authorities cited. Counsel for plaintiff in error do not attempt to deny that the common law remedy in question existed under the common law of Texas, prior to the enactment of the Interstate Commerce Law of 1887. Their sole contention is that it

was annuled "*by necessary implication*," by the passage of that Act. The implications are all the other way. This Court must hold that the new remedies provided by the Act are simply cumulative, unless it sees fit to disregard all of the elementary principles of statutory construction which govern the subject.

III.

"Interpretation Clause" in the Interstate Commerce Act of February 4, 1887.

So far the fact has been ignored that the acting question contains an interpretation clause in which Congress has specially defined its meaning in certain respects so that it can not by possibility be misunderstood. The terms of the interpretation clause are as follows: "Sec. 22. That nothing in this Act shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States, State or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the issuance of mileage, excursion or commutation passenger tickets. Nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; *and nothing in this Act contained shall in any way abridge or alter* THE REMEDIES NOW EXISTING AT COMMON LAW or *by*

statute, but the provisions of this Act are in addition to such remedies: Provided, That no pending litigation shall in any way be affected by this Act." "A legislative construction of an act embodied in the act itself is binding on the Courts." Am. and Eng. Enc. of Law, Vol. 6, p. 1035, citing Smith *v.* State, Ind. 321. A statutory declaration contained in the body of an act declaring the meaning thereof as well as the intent of the legislature in enacting it, is mandatory and controlling on the courts. Farmers' Bank *v.* Hale, 59 N. Y. 53; Com. *v.* Curry, 4 Pa. Super. Ct., 356; Snyder *v.* Compton, 87, Tex. 374; Rossmiller *v.* State, 114 Wis., 169. This Court is therefore bound by the statutory declaration contained in the body of this Act to the effect that "*Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.*" Congress had a perfect knowledge of pre-existing law when the acting question passed. It knew the immemorial remedy which the common law gave a shipper in such a case. Its purpose was to supplement that ancient remedy by new statutory remedies. It therefore in the interpretation clause expressly declared that the ancient common law remedy should neither be altered nor abridged. Then it was careful to declare further that the remedies contained in the Act "are in addition to such remedies" as previously existed.

In the dissenting opinion filed in Missouri P. P. Co. *v.* United States, 189 U. S. 274, Justices Brewer and Harlan, after quoting the interpretation clause contained in sec. 22, concur in the following statement: Every remedy, there-

fore, that the government or any individual had to compel the performance by carriers of interstate commerce of their legal obligations remains unaffected by that act. On the contrary, as we have seen, it expressly provides that all other remedies are left unaffected by the act, and a duty cast by statute *equally with a common-law duty* may by the very language of the act be enforced in any manner known to the law."

And yet despite the settled rules of construction in such a case, despite the clear and explicit declarations of the interpretation clause, counsel for plaintiff in error are urging the court so to construe the statute in question as to abrogate the common law remedy by implication. The futile attempt made to explain away the interpretation clause need not be specially mentioned, as it is not serious.

IV.

No right, title, privilege or immunity under a Federal statute specially pleaded and set up in the State court, was denied by that court.

It has been here held that "it is not every case where a Federal statute has been construed by a state court that gives a right of review to this Court, but the claim of any right, title, privilege or immunity under the statute must have been denied by the state tribunal in order to give us jurisdiction to review its judgment. That a Federal statute was construed unfavorably to one of the parties to the suit is no ground for jurisdiction by this Court, unless such construction was not only unfavorable but was against the right, etc., specially set up and claimed

under the statute." Kizer *v.* Texarkana and Fort Smith Railway Co., 179 U. S., 199. Even if the state court could not try questions involving the construction of the Interstate Commerce Act, yet this suit being brought on the common law of liability of plaintiff in error, jurisdiction to hear and determine the facts pleaded by defendant in error could not be defeated by facts outside of the allegations unless a plea had been interposed to the jurisdiction; such plea showing want of jurisdiction in the trial court and further showing a court with jurisdiction. In this case the petition declaring alone on the general or common law liability of plaintiff in error, and want of jurisdiction not appearing from allegations in the petition, before the court could entertain the question of jurisdiction by reason of plaintiff having complied with certain essentials and formalities required by the Interstate Commerce Act, such facts should have been pleaded by plaintiff and the question of jurisdiction raised by proper plea questioning the jurisdiction of the state court. Therefore, even if the primary court was without jurisdiction by reason of the Federal statutes, before such facts could be urged they should have been presented by a proper plea, in due order of pleading; and there being no such plea the primary court erred in considering the question of jurisdiction. Plaintiffs by its answer having invoked a hearing of the facts as matter defensive, and not in bar, and having justified the charges by reason of the rate being fixed, etc., by alleged compliance with the Federal law, and having pleaded in defense and justification of the charges, that same were not unreasonable and were not exorbitant, it

thereby submitted to the jurisdiction of the Court and thereafter could not claim that the court was without jurisdiction, the subject-matter being within the general jurisdiction of the Court.

If in any event a carrier can justify or escape liability for charging unjust, unreasonable, extortionate, and discriminative rates by reason of the Interstate Commerce Act, it must at least show that the provisions of such law have been complied with. And as the facts herein show that the shipments in question were from points on defendant's line in Louisiana to points on its line in Texas, what is known as an "individual" schedule was required by said Act, showing such rates; and as the evidence and findings show that no such "individual" schedule had ever been established or published, and that only a "joint schedule" between defendant and a number of other roads was attempted to be established and published, there was not established under the said Act any rates between said shipping points.

Even should it be contended that said "joint schedule" can be made the basis of rates under the Interstate Act, same can not prevail herein as "shippers are not effected by the Act until the required publication of rates has been made, and to bring them within its operation in a given case, the burden is upon the carrier to show compliance with that condition precedent," and as the schedules introduced by defendant were "joint schedules" and the act requiring such publication to be made thereof as the Commerce Commission might prescribe, and there being nothing to show what publication was required, the rates

mentioned in the "joint schedule" were not established or operative. There was an utter want of testimony as to what publication the commission had required, and there is no finding as to this, the record being silent. The primary court found that the "joint schedule" was filed with Commission, and that copies of same were kept in the office of plaintiff at said points of shipment and at destination; that is, in freight offices and depots for inspection of the public "as admitted by plaintiff, which admission is found in the statements of facts." The admission referred to was to effect that tariffs and classifications had been published in pamphlet form and copies filed in plaintiff's office at Abilene and at plaintiff's offices at points of shipment, but it was not admitted that they had been properly filed or published. The primary court found that the "joint schedule" had been filed with the commission. On these findings the primary court based its conclusion that plaintiff had complied with the Interstate law and the rates properly established. These conclusions were excepted to and especially for the reason that there was no testimony showing or tending to show that the law as to publications of joint schedules had been complied with.

AUTHORITIES.

Interstate Commerce Act, Sec. 6, providing for measure of publicity to be given to joint schedules, U. S. Compiled Stats., 1901, p. 3,157.

Chicago & N. W. Ry. *v.* Osborne, 52 Fed., 912; 3 C. C. A., 347.

Atlanta, K. & N. Ry. *v.* Horne, 59 S. W. (Tenn.), 134.

This being a contest with respect to shipments between points on plaintiff's line, to have the benefit of the Interstate Commerce Act against defendant it devolved on plaintiff to show the publication exacted and required by the act itself; in other words, the act requiring that "such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected," as a condition precedent to the due establishment of rates; the requirements enumerated in such act must be complied with and the evidence must show such compliance, and the evidence and the findings showing that such requirements had not been met, plaintiff can not defend by reason of said Act. The burden is on the carrier to show affirmatively that the required publication has been made; the Act not being self-executing as to the public no presumptions will be indulged.

It should not be seriously insisted that the facts show a publication in keeping with the Act. It is not the filing with the commission that establishes the rates; the commission is in no sense a judicial body; it has nothing to do with making the rates; it can not refuse to file rates tendered by the carriers, however unjust they may be. True, after filing and the establishment of them the commission can inquire into the facts and if it finds the rates unjust it can so find, and then go to a court and seek a judicial remedy, and such finding by the commission will

be considered *prima facie*, but not conclusive on the courts. No presumptions attach to or follow the action of the commission. At the time of these shipments its authority was clerical only; it could make no inquiry before filing; it could only file.

In the event it should be held that a statutory publication of a "joint tariff or schedule" complied with the Interstate Commerce Act and thereby rates were established between points on appellee's line, then before it can be so held the appellee must show that the statutory requirements as to publication have been complied with; and as the Act provides that such "carriers shall print and keep open to public inspection schedules showing, etc. * * * The schedules printed as aforesaid * * * shall plainly state the places * * * and contain the classification of freight in force * * * and shall also state. * * *

Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station or office of such carrier where passengers or freight respectively, are received for transportation in such form that they shall be accessible to the public and can be conveniently inspected;" and agreement of parties, "that the tariffs and classifications mentioned in the depositions of E. A. Mosley, (a witness for plaintiff), have been published in book and pamphlet form, and that copies have been filed in the T. & P. office at Abilene for the inspection of the public and that they were filed at the time of these shipments and were also in the T. & P. offices at the points of the origin of the shipments, but as to whether they

were properly filed and published is not admitted," does not show compliance with the terms and requirements of the Act. "The verb post is defined: to attach to a sign post or other usual place of affixing public notices; to advertise, as to post a notice." "Public" means in open view; "conspicuous" means open to view, catchy to the eye, easy to be seen, manifest. Century Dictionary. A finding that such schedules had been filed does not meet the requirement of the act. "Filing" does not mean publicity or conspicuousness; it means the reverse.

The facts found by the primary court did not authorize the conclusion of law that plaintiff complied with the Act and that the schedules were properly established and in force, for this conclusion of law is predicated on the said ninth finding, and as it merely finds that same were kept in the offices of plaintiff, etc., such finding did not authorize the conclusion that such finding established is a matter of law compliance with the Act.

There is nothing in this record which will justify a reversal of the judgment rendered by the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

HANNIS TAYLOR,

Counsel for the defendant in error.